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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERT T. JOHNSON, III,

Plaintiff and Appellant,

v.

OCEANS 6 RS, LLC,

Defendant and Respondent.

D072674

(Super. Ct. No. 37-2016-41451-CU-
PO-NC)

APPEAL from an order of the Superior Court of San Diego County, Timothy M. Casserly, Judge. Affirmed.

Robert T. Johnson, III, in pro. per., for Plaintiff and Appellant.

Murchison & Cumming, LLP, Robert M. Scherk and Scott J. Loeding, for
Defendant and Respondent.

Plaintiff and appellant Robert T. Johnson, III, filed a complaint on November 28, 2016, against defendant and respondent Oceans 6 RS, LLC (Oceans 6), doing business as Firewater Saloon, and John Wigent, a doorman or security guard at the Firewater

Saloon.¹ Johnson stated two causes of action: one for assault and battery and one for malicious prosecution. Oceans 6 moved to strike the cause of action for malicious prosecution under the anti-SLAPP² statute (Code Civ. Proc., § 425.16).³ The trial court granted the motion and Johnson has appealed that order. We affirm.

MOTION TO DISMISS APPEAL

Oceans 6 filed a motion to dismiss the appeal because the opening brief was not timely, and when it was filed it was incomplete and lacking in applicable factual and legal citations. We ordered that this motion be considered concurrently with the appeal.

Oceans 6's motion to dismiss is well-taken both for lack of timeliness and for failure to comply with California Rules of Court, rule 8.204(a), which states the required contents of a brief. Nonetheless in the interest of justice we have reviewed the record and briefs and considered Johnson's contentions.

BACKGROUND

Johnson alleged the following facts in his complaint.

On November 27, 2014, Johnson went to the Firewater Saloon in Oceanside, left, and returned. Wigent told Johnson to leave because there were complaints that Johnson had been taking pictures of women inside the bar. Johnson alleged that once he was

¹ Wigent was not served with the complaint and is not a party to this appeal.

² " 'SLAPP' is an acronym for 'strategic lawsuit against public participation.' [Citation.]" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 381, fn. 1.) An order on an anti-SLAPP motion is immediately appealable. (§§ 425.16, subd. (i); 904.1, subd. (a)(13).)

³ Further statutory references are to the Code of Civil Procedure unless otherwise stated.

outside, Wigent repeatedly pushed him along the sidewalk, away from the bar. Johnson said he "swung his fist" at Wigent's head in response. Johnson was off-balance from his swing. Wigent pushed him and he fell to the ground.

Johnson called 911. He told the responding police officer that he wanted to press charges against Wigent. The officer spoke with Wigent, then gave Johnson a citation to appear in court for misdemeanor assault. The District Attorney declined to prosecute Johnson and no charges were ever filed against him. Johnson filed a claim for malicious prosecution against Oceans 6 and Wigent, based on Wigent's statement to the police that Johnson assaulted him, resulting in a misdemeanor citation for assault. As noted, the trial court granted Oceans 6's motion to strike the malicious prosecution cause of action and Johnson has appealed the order.

DISCUSSION

A. *General Anti-SLAPP Principles*

SLAPP lawsuits " 'are generally meritless suits brought primarily to chill the exercise of free speech or petition rights.' " (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 (*Simpson*).) Section 425.16, the anti-SLAPP law, authorizes the filing of a motion to strike to expedite dismissal of these meritless claims. (*Simpson*, at p. 21.) "[T]he Legislature has specified that the anti-SLAPP statute 'shall be construed broadly.' (§ 425.16, subd. (a).)" (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 416.) The anti-SLAPP statute and procedure have been found constitutional. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 865–868.)

Section 425.16, subdivision (e), describes the type of free speech or petition rights protected by the anti-SLAPP statute: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).) The public interest requirement of section 425.16, subdivision (e) is construed broadly. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 23.)

Conduct that is unlawful in itself is not protected by the statute. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 317 (*Flatley*); *Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1478 (*Zucchet*).) The exception for unlawful conduct is very narrow and applies only when the conduct was shown to be illegal "either through defendant's concession or by uncontroverted and conclusive evidence." (*Flatley*, at p. 320; *Zucchet*, at p. 1478.)

The moving party — Oceans 6, the employer of Wigent — bore the initial burden of establishing that the responding party — Johnson — complained of actions taken by Wigent in furtherance of his "right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue," as defined in the statute. (§ 425.16, subd. (b)(1).)

Once Oceans 6 established that Wigent's act fell within the scope of section 425.16, subdivision (e), Johnson could show that the act was exempt from the protection of the anti-SLAPP statute. Section 425.17 sets forth two exemptions to the anti-SLAPP statute, for public interest lawsuits and for commercial speech. (§ 425.17, subds. (b), (c); *Simpson, supra*, 49 Cal.4th at p. 22.) Both exemptions are narrowly construed, and the moving party has the burden of proving the applicability of the exemption. (*Simpson*, at pp. 22–23.) Johnson claimed that Wigent's act fell within the commercial speech exemption set forth in section 425.17, subdivision (c).⁴ To show that an action fell under the commercial speech exemption, Johnson had the burden of showing that: (1) Oceans 6 was primarily engaged in the business of selling goods or services; (2) Wigent's statement was a representation of fact about the business operations or services, made for the purpose of obtaining or promoting sales of Oceans 6's goods or services; and (3) the intended audience was an actual or potential customer. (§ 425.17, subd. (c); *Simpson, supra*, 49 Cal.4th at p. 30.) Johnson had the burden of proving all of these elements. (*Rivera v. First Data Bank, Inc.* (2010) 187 Cal.App.4th 709, 717–718 (*Rivera*).)

⁴ Section 425.17, subdivision (c) states:

"(c) Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, . . . arising from any statement or conduct by that person if both of the following conditions exist:

"(1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services,

"(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer,"

The final step, after *Oceans 6* showed that Wigent's action was taken in furtherance of his right of petition or free speech, and Johnson failed to show that the commercial speech exemption applied, was for Johnson to show that his claim of malicious prosecution had "at least 'minimal merit.' " (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*).)

"On appeal, we apply a de novo review standard to determine whether the parties satisfied their burdens under sections 425.16 and 425.17. [Citations.] We are not bound by the court's findings and conduct an independent review of the entire record. If the trial court's decision is correct on any theory, we must affirm the order." (*San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 622.)

B. Analysis

1. Wigent's Complaint to the Police of Assault by Johnson Was Protected by the Anti-SLAPP Statute

Johnson claims that Wigent's statements to the police, which caused the police to issue a citation for assault, constituted malicious prosecution. Filing a report with the police, however, is protected activity within section 425.16, subdivisions (e)(1) and (e)(2). (*Comstock v. Aber* (2012) 212 Cal.App.4th 931, 941–942; *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 364.) Wigent's complaint to the police that Johnson assaulted him was taken in furtherance of his right of petition or free speech.

Johnson admitted that he assaulted Wigent by swinging his fist at Wigent's head. He claimed in the trial court, however, that Wigent's report of assault was unlawful because Johnson was allegedly acting in self-defense. Whether Johnson acted in self-

defense when he assaulted Wigent was a disputed issue of mixed fact and law. His assertion of self-defense did not meet the standard necessary to demonstrate unlawfulness: "either through defendant's concession or by uncontroverted and conclusive evidence." (*Flatley, supra*, 39 Cal.4th at p. 320.)

2. The Exception for Commercial Speech Does Not Apply

Johnson contends that Wigent's statement to the police was exempted commercial speech, arguing that Wigent's claim that he was assaulted by Johnson "was a statement or conduct that was made in the course of delivering . . . goods or services," and that the officer to whom Wigent complained was "a potential customer of FireWater Saloon" and Johnson was an actual customer. Wigent's statement to the police that Johnson had assaulted him was not a representation of fact about Wigent's or Oceans 6's business made for the purpose of promoting sales, as required by section 425.17, subdivision (c)(1). Wigent's complaint of assault was not commercial speech and was not exempt from the anti-SLAPP statute. (See *Rivera, supra*, 187 Cal.App.4th at pp. 717–718.)

3. Johnson Cannot Show Minimal Merit

Johnson has not and cannot show that his claim for malicious prosecution had even minimal merit. (See *Park, supra*, 2 Cal.5th at p. 1061.) There is no claim for malicious prosecution when there is no prosecution, that is, when an arrest did not result in formal charges. (*Van Audenhove v. Perry* (2017) 11 Cal.App.5th 915, 917–918.) Johnson admitted that no formal charges were ever filed against him.

In sum, the anti-SLAPP statute bars Johnson's cause of action for malicious prosecution. Wigent's complaint to the police of assault was protected activity. It was

not commercial speech. And Johnson had no claim of malicious prosecution because he was never prosecuted for assault as a result of Wigent's report. The anti-SLAPP motion was correctly granted.

DISPOSITION

The order striking Johnson's claim for malicious prosecution is affirmed. Oceans 6 is entitled to its costs on appeal.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

DATO, J.